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80-1307

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

FRANCISCO M. CAMACHO, Petitioner,

v.

STATE OF WISCONSIN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
STATE OF WISCONSIN

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January 29, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

FRANCISCO M. CAMACHO, Petitioner,

v.

STATE OF WISCONSIN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court denied Petitioner's constitutional right to confront his accuser when, on cross-examination, the trial court precluded Petitioner from cross-examining him as to relevant and material lines of inquiry relating directly to the said accuser's bias, prejudice, ve-

racity, or ulterior motives for falsifying.

II. Whether the Petitioner's Fifth and Fourteenth Amendments rights to due process of law were violated when the trial judge instructed the jury to find the Petitioner either innocent or guilty by a unanimous verdict.

III. Whether Petitioner's constitutional right to a jury trial by an impartial jury and his constitutional right to due process of law were violated when the bailiff impermissibly advised the jury on how they were to deliberate.

OPINIONS BELOW

The decision of the Court of Appeals of the State of Wisconsin was rendered on August 13, 1980, and is set out in full in the Appendix, beginning at Page 2a, infra. A petition for review of this decision was made to the Supreme Court of the State of Wisconsin, but was denied on December 1, 1980.

This decision is set out in full in the Appendix at Page 1a. An order by the circuit court (then sitting as an appellate court for the trial court) affirming the trial court's judgment is set out in the Appendix at Page 10a.

JURISDICTION

This court is asked to review the judgment of the Wisconsin Court of Appeals rendered on August 13, 1980. A petition for review of the Court of Appeals' judgment was duly filed with the Wisconsin Supreme Court, but was denied on December 1, 1980. Jurisdiction of this court is invoked pursuant to 28 U.S.C.§ 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The amendments to the United States Constitution which petitioner believes confers on this court jurisdiction to review the judgment of the Court of Appeals for

the State of Wisconsin in question by certiorari are as follows:

U. S. Constitution Amendment V.

U. S. Constitution Amendment VI.

U. S. Constitution Amendment XIV.

The pertinent text of the above cited constitutional amendments is set out in full in the Appendix at Page 11a.

STATEMENT OF THE CASE

A jury returned a verdict of guilty against Petitioner on April 14, 1978, on a charge of carrying a concealed weapon. During the trial Petitioner was precluded by the trial court from cross-examining the only witness for the prosecution relating to his bias, prejudice, ulterior motive for falsifying, and to impeach the veracity of testimony produced by that witness. The incident took place on December 14, 1976, when Petitioner was physically assaulted by the accusing witness, Narciso Aleman, in a

building Petitioner owned. Petitioner attempted to cross-examine Aleman in establishing that he could not have seen the gun because he (Aleman) was always behind the Petitioner and the gun was carried on Petitioner's waist without a coat, but easily discernable by ordinary observation had the witness been in front of Petitioner, and thus was not concealed. However, the trial court precluded Petitioner from establishing this before the jury. During the incident the accusing witness physically assaulted Petitioner with the aid of three other persons. They dragged him violently into a room, locked the doors and kept Petitioner on the floor, beating him continuously for twenty minutes or so, and threatening him with injury to his body and life. Petitioner had forgotten he had the gun in his haste to attend to his tenants within the said building. The gun was given to the police by Aleman with the manufactured

story that Petitioner had been carrying it concealed. Petitioner further attempted to ascertain the place of birth of the accusing witness, his educational background, his relation to the Central Intelligence Agency (insofar as Petitioner had been reliably informed that the accusing witness was an undercover agent for that agency posted within the Mexican-American community to foment strife and disharmony within it). But the trial court precluded Petitioner from establishing all of the above before the jury so that they could evaluate the bias and prejudices of the witness and his interest for falsifying, and to provide this exculpating evidence before the jury. Numerous motions for mistrial were made, and offers of proof were made, but the trial court overruled them. Thus the jury was deprived of the information necessary to evaluate the credibility of the witness as to a relevant and material line of inquiry. Therefore, Pet-

itioner was denied his right to cross-examine his accuser.

The trial court instructed the jury that before they could return a verdict that could legally be received, they were to reach it unanimously. Two forms of verdict were given: One for guilty and one for innocent. Petitioner first raised this issue with the Court of Appeals and that Court ruled on the question presented against the Petitioner and thus it is proper for this court to issue its Writ of Certiorari as to this point. (See Appendix at Page 5a.)

During the deliberations of the jury a question arose in their minds as to the question of concealment. The bailiff instructed the jury, out of the presence of the Petitioner, the trial judge and the District Attorney, that they were to continue deliberating and to resolve the question on the basis of the instructions already given to them by the court. The

question was raised by Petitioner after the judgment of guilty was entered, but the Circuit Court, sitting as an appellate court for the trial court on March 29, 1979, did not pass upon it because he was under the impression that another judge, who had recently died as of that date, had already passed upon that question and thus he did not consider it. Petitioner contends that the issue is properly before this court because the Court of Appeals and the Court of Wisconsin had an opportunity to pass upon it, but declined to do so.

REASONS FOR ALLOWANCE OF THE WRIT

BECAUSE THE COURT BELOW PROHIBITED PETITIONER FROM CROSS-EXAMINING HIS ACCUSER AS TO THE LATTER'S POSSIBLE BIAS, PREJUDICES, PARTIALITY, HIS INTEREST IN THE OUTCOME OF THE TRIAL, HIS ULTERIOR MO-

TIVES ON THE ISSUES AND PERSONALITIES IN THE CASE AT HAND, PETITIONER WAS EFFECTIVELY DENIED HIS RIGHT TO EFFECTIVE CROSS-EXAMINATION.

The decision of the Court of Appeals in effect held that it is irrelevant and immaterial to cross-examine an accuser-witness into those areas that would tend to show bias, prejudices, personal motives for falsifying and any other lines of inquiry that would help the jury to test the credibility of the witness and evaluate the probative value of his testimony on direct examination. This decision is contrary to the holding of this Court in the celebrated case of Davis v. Alaska, 415 U.S. 308, 94 Ct. 1105, 39 L. Ed. 2d 347 (1974). There this Court held that:

> The Sixth Amendment to the Constitution guarantees the right of an accused in a

criminal prosecution "to be confronted with the witnesses against him,:" This right is secured for defendants on state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witnesses physically. "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." (Quotations omitted.)

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness. ... A more particular attack on the witness' credibility is effected by means of cross-examination directed towards revealing possible biases, prejudices, or ul-

terior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at the trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence §940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. (Citation and footnote omitted.)

.....

... On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1,3." Smith v. Ill-

inois, 390 U.S. 129. 131 (1968). 415 U.S. 315-318.

Subsequent to the trial of this case independent information reached Petitioner to the effect that the accusing witness against Petitioner might have been in fact an agent of the Central Intelligence Agency planted within the Mexican-American community to foment trouble and divisiveness similar to the one caused Petitioner, that is, that his job is to single out those Mexican-American persons most likely to succeed, such as Petitioner, as well as to infiltrate those community organizations providing for the human needs of minority groups, polarize its members, create failure for them and then move on to another community. In fact, a lawsuit was filed by the accusing witness for libel on this very point.*

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*See Narciso L. Aleman v. Jose Angel Gutierrez, Abel Ortiz, Tony Baez, Gilberto Cano, Alfredo Zamora, et al.; Case No. 463544, filed April 4, 1978, in the Circuit

Defendant believes that he is entitled to proceed with discovery on the question of Aleman's employment with the Central Intelligence Agency at the time this incident arose (December 14, 1976) and whether he was in fact planted within the Mexican-American community to polarize it and neutralize its leaders. This information would be in the nature of exculpatory evidence and would be a gross misconduct on the part of the prosecution if they knew about Aleman's role on December 14, 1976, but never shared it with Petitioner.

This question was raised by Petitioner before the Court of Appeals, but the Court held that the testimony sought was irrele-

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Court for Milwaukee County, State of Wisconsin. Alfredo Zamora and Abel Ortiz were the ones who helped Narciso L. Aleman (the prosecution's accusing witness herein) physically beat Petitioner. Jose Angel Gutierrez was a county judge in Texas and the rest of the defendants were very able leaders within the Mexican community in Wisconsin.

vant and denied relief. Thus this court may pass on this question in deciding whether to grant the Writ sought herein.

II. IT WAS ERROR FOR THE TRIAL COURT TO HAVE INSTRUCTED THE JURY THAT THEY WERE REQUIRED TO RENDER A UNANIMOUS VERDICT ON EITHER THE GUILT OR INNOCENCE OF PETITIONER.

The Fifth Amendment guarantees to each and every person within the United States the right against self-incrimination. U.S. Const. amend. V. A person is presumed to be innocent until that presumption is overcome by evidence which satisfies the trier of fact that the person is guilty beyond a reasonable doubt. However, the trial court instructed the jury that before they could return a verdict that could be legally received, they must reach it unanimously and that two forms of verdict were to be given

to them: One for guilty and one for innocent.

Petitioner believes that the requirement for the jury to pass upon the innocence of the defendant and to find him to be so by a unanimous verdict in effect contradicts and nullifies our constitutional right to be presumed innocent until a verdict of guilty is reached unanimously. Since Petitioner herein was presumed to be innocent of the charge, the only permissible question a jury could pass upon was the question of guilt. There was no question but that the defendant was innocent of the charge prior to rendering the guilty verdict.

Furthermore, there was no instruction from the trial court by what standard of proof they were to find defendant innocent, which would be presumably, then, by the same standard of proof as that for the finding of guilt. This in effect shifts

the burden of proof to the defendant as to each and every element of the crime. All of this is taking place in every court of this Great Land of ours. Thus this Court must pass upon this issue and grant the Writ requested herein, because Petitioner was convicted in violation of his Fifth Amendment rights and his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

This question was raised for the first time by Petitioner on appeal to the Court of Appeals of the State of Wisconsin and the issue was considered, but was denied. Thus this Court is free to pass upon it, because it has reached finality within the State court system of the State of Wisconsin. Furthermore, the question is of such magnitude that this Court must act immediately to protect the constitutional rights of each and every petitioner similarly situated.

III. PETITIONER WAS DENIED DUE PROCESS OF LAW AND TO BE TRIED BY AN IMPARTIAL JURY WHEN THE BAILIFF ASSIGNED TO SEQUESTER THE JURY FROM THE PUBLIC AS THEY WERE DELIBERATING, IN RESPONSE TO THE JURY'S QUESTION AS TO WHAT CONSTITUTED CONCEALMENT, INSTRUCTED THEM TO CONTINUE DELIBERATING AND TO REMEMBER THE INSTRUCTIONS THE JUDGE GAVE THEM, BECAUSE THE JUDGE WOULD NOT RETURN FOR SOME EXTENDED PERIOD OF TIME.

After the jury received the case for deliberation, there arose a question in their minds as to what constituted concealment. The trial judge had gone to dinner, but was on call and had requested to be called if the jury reached a verdict or had any questions on the instructions or other-

wise. The bailiff who was assigned to sequester the jury to keep them safe and comfortable as they were deliberating, instructed the jury that they were to keep on deliberating and should just remember the instructions given to them by the judge and that the judge would return in a couple of hours. This instruction by the bailiff to the jury was given without permission of the Court, nor with the permission of any party to this case.

Therefore, Defendant was again denied his constitutional right to a fair and impartial jury for his trial and to due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, respectively.

This issue was raised by Petitioner in his first appeal to the Circuit Court but the Circuit Court judge was of the opinion that that question had already been passed upon by another judge, when in truth it had

not. The Court of Appeals for the State of Wisconsin refused to consider it upon the grounds that it had not been timely raised insofar as it was raised for the first time in the latter forum.

However, the constitutional questions presented herein are of great importance and the Court should consider granting the Writ as to this question as well.

CONCLUSION

For the above stated reasons, it is submitted that the petition for the Writ of Certiorari should be granted.

Dated this 29th day of January, 1981.

Respectfully submitted,

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A P P E N D I X

Office of the Clerk
SUPREME COURT
State of Wisconsin

Madison, December 1, 1980

TO: Francisco M. Camacho
P. O. Box 161
Milwaukee, WI 53201

Jeff Kremers
Assistant District Attorney
Safety Building, 821 W. State St.
Milwaukee, WI 53233

The Court today announced an order in your case as follows:

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No. 79-1718-CR - Francisco M. Camacho v. State of Wisconsin

The court having considered the defendant's petition for review, the state's motion to strike, and the defendant's motion for an enlargement of time within which to serve the petition for review on the state,

IT IS ORDERED the motion to strike is denied, the motion for an enlargement of time is denied, and the petition for review is denied. No costs.

Coffey, J. did not participate.

No. 79-1718-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

FRANCISCO M. CAMACHO,

Defendant-Appellant,

v.

STATE OF WISCONSIN,

Plaintiff-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM H. CARVER, Judge. Affirmed.

DECKER, C.J. Francisco M. Camacho was found guilty by a jury in county court of carrying a concealed weapon, in violation of sec. 941.23, Stats. Camacho appealed his conviction to the circuit court which denied his motion for a new trial and affirmed the trial court's rulings in all respects. From the circuit court order dated

October 5, 1979, Camacho appeals. [1]

On December 14, 1976, Camacho was working on a boiler in an apartment building he owned. He went upstairs during the afternoon to inform the tenants that he was working on the boiler and there would be no heat for awhile. Before leaving the boiler room, Camacho tucked a revolver in his pants, intending, he testified, to take it to the janitor's closet. He went upstairs and became involved in an argument and physical altercation with one of his tenants. The tenant testified that during the incident, Camacho started to draw the revolver from the waistband of his pants. Camacho testified that the gun fell from his waistband as he bent over a wash basin to wash his face after being struck.

Camacho makes contentions on appeal, all of which we find to be without merit. First, Camacho contends that he was denied his right to confrontation of witnesses by

the trial court's restriction of his cross-examination of the tenant. Principally, the trial court precluded Camacho from questioning the tenant on both the substance and details of the altercation with Camacho because it was irrelevant to the issues of whether Camacho was armed with a dangerous weapon and whether thatweapon was concealed. We agree that the reasons for and details of the fight are irrelevant to the issues at trial. The right to confront witnesses is not violated by precluding the defendant from presenting irrelevant evidence.[2]

Second, Camacho contends that he was denied his right of confrontation when the trial court precluded him from questioning the tenant if he was in the employ of the Central Intelligence Agency. The testimony sought was irrelevant and its preclusion was proper.[3]

Third, Camacho asserts denial of his right to a fair trial by the court's preclu-

sion of his testimony as to the facts and circumstances surrounding the altercation. As this testimony was irrelevant to the issues related to the charge of carrying a concealed weapon, preclusion was fair and proper.

Fourth, Camacho contends that the trial court violated his right to due process and the presumption of innocence by instructing the jury that they were to find the defendant innocent unanimously.[4] The duty of the jurors, as reflected in their oath, is to give a verdict.[5] It is not violative of due process to instruct jurors that they have a duty to reach a verdict and that to reach a verdict they must all agree.[6] Instructions must be considered and construed as a whole.[7] We especially disagree that the challenged instruction is erroneous when read in the context of the other instructions given:

The law presumes every person

> charged with a commission of an offense to be innocent. ... The defendant is not required to prove his innocence.... Before you can return a verdict of guilty, the state must prove to your satisfaction beyond a reasonable doubt that the defendant is guilty.

Fifth, Camacho alleges misconduct by a bailiff. Camacho raises this issue for the first time on appeal to the circuit court and therefore has no right to appeal.[8] Further, we cannot consider the contention as the trial court record forwarded to this court contains no reference to the alleged incident.

Sixth, Camacho contends that there never was a judgment to execute or appeal from because the judgment was entered by the deputy clerk of courts for Milwaukee County, without written direction from the presiding judge and therefore was not rendered in compliance with sec. 806.06(1), Stats. Section 806.06(1) applies to civil judgments. Crim-

inal judgments are controlled by sec. 972.13 (4), which requires that "(j)udgments shall be in writing and signed by the judge or a clerk." (Emphasis added.)

Finally, Camacho contends that the verdict should be reversed or a new trial granted because "a great miscarriage of justice" occurred at the trial. We find no evidence of any injustice. The verdict is amply supported by the evidence and is affirmed.

By the Court.--Order affirmed.

Recommendation: Not recommended for publication in the official reports.

APPENDIX

[1]Camacho also appeals from a judgment dated October 5, 1979. No judgment dated October 5, 1979 is in the record.

[2]Milenkovic v. State, 86 Wis.2d 272, 286, 272 N.W.2d 320,327 (Ct. App. 1978).

[3]See Milenkovic, supra note 2.

[4]The trial court instructed the jury as follows:

> I charge you to keep your duties steadfastly in mind as upright citizens to render then a just and true verdict. The following two forms of verdict will be submitted to you for your consideration concerning the charge against the Defendant, which will read as follows: "We, the jury, find the Defendant, Francisco Camacho, guilty of the offense of carrying a concealed weapon as charges in the Criminal Complaint." The other reading, "We, the jury, find the Defendant, Francisco Camacho, not guilty of carrying a concealed weapon."
>
> That is for you to determine which form of verdict submitted that you will bring in as your verdict. This is a criminal, not a civil case, so, therefore, before the jury can return a verdict which can be legally received,

such verdict must be reached unanimously. This means in a criminal case all 12 jurors must agree in order to arrive at the verdict.

[5]Sec. 895.39, Stats. See also sec. 895.40 requiring the officer in charge of the jury to swear to "keep all jurors ... together ... until they have agreed on their verdict or are discharged ... ."

[6]Kelley v. State, 51 Wis.2d 641, 643-47, 187 N.W.2d 810, 811-14 (1971); Mead v. City of Richland Center, 237 Wis. 537, 542, 297 N.W. 419, 421-22 (1941); Boyd v. State, 217 Wis. 149, 158-59 258 N.W. 330, 333-34 (1935)' Barlow v. Foster, 149 Wis. 613, 628-30, 136 N.W. 822, 828-29 (1912). See also American Bar Association Standards, Trial by Jury, sec. 5.4 (Approved Draft 1970) (providing that "(b)efore the jury retires for deliberation, the court may give an instruction which informs the jury ... that in order to return a verdict each juror must agree thereto; ... .").

[7]State v. Davidson, 44 Wis.2d 177, 190, 170 N.W.2d 755, 762 (1969). See also Anderson v. State, 66 Wis.2d 233, 250, 223 N.W.2d 879, 888 (1974).

[8]State v. Dreske, 88 Wis.2d 60, 73, 276 N.W.2d 324, 331 (Ct. App. 1979); Gedicks v. State, 62 Wis.2d 74, 84, 214 N.W.2d 569, 574 (1974).

A P P E N D I X

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

-v- O R D E R

FRANCISCO CAMACHO, CASE NO. J-2924
Defendant-Appellant.

Upon all the records, files and proceedings had herein;

IT IS HEREBY ORDERED that the trial court's rulings are affirmed in all respects and the defendant's motion for a new trial is denied and this matter is remanded to trial court for imposition of sentence.

Dated this 5th day of October, 1979.

BY THE COURT:

/s/William H. Carver
HONORABLE WILLIAM
H. CARVER

Circuit Judge

AMENDMENTS TO THE

UNITED STATES CONSTITUTION

ARTICLE V.

"No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;... ."

ARTICLE VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

ARTICLE XIV.

Section 1. "...nor shall any State deprive any person of life, liberty, or property, without due process of law;..."